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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 538

D. C. CARTER, a/k/a
JOHNNIE CARTER,
Petjtioner,
v.
STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

BRIEF OF RESPONDENT

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OPINIONS BELOW

The Opinion of the District Court of Appeal of Florida, Fourth District, and the Opinion of the Supreme Court of Florida have previously been attached to the petitioner's Petition for Writ of Certiorari as Exhibits 1 and 3.

JURISDICTION

The respondent respectfully submits that the Su-

preme Court of the United States does not have jurisdiction in the instant case of the District Court of Appeal of Florida, Fourth District, under the provisions of Section (3) Title 28, Section 1257, United States Code, as the validity of a treaty or statute of the United States was not drawn in question; nor was the validity of a State statute drawn in question on the ground of its being repugnant to the Constitution, treaties, or law of the United States; nor was petitioner deprived of any title, right, privilege, or immunity as is specifically set up or claimed under the Constitution, treaties, or statutes of, or commissions held, or authority exercised under the United States. This will be further substantiated in the Argument section hereinafter set forth.

QUESTIONS PRESENTED

1. Whether petitioner has been deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States?

2. Whether the decision of the State Courts is sustainable on an adequate and independent, non-federal ground?

STATUTES AND CONSTITUTION INVOLVED

Article 5, Section 4, Constitution of Florida.

STATEMENT

1. Respondent will adopt, as its opening statement, that portion of the Statement as contained in petitioner's brief under paragraph number 1.

2. Petitioner, in his Statement, has basically set forth in paragraph number 2 the testimony of petitioner during the trial, and we see no need to repeat it here. However, certain inconsistencies should be pointed out, and additional testimony should also be brought to the attention of this Court, which we will now do.

Margaret Harrell, common-law wife of the deceased, testified that the petitioner fired the first three shots while the deceased was in the truck (T 200, 201). The deceased then got out of the truck on the right-hand side and tried to crawl under it (T 202), whereupon the petitioner came around the truck and fired two more shots at the deceased (T 203). While the petitioner was reloading his gun, the deceased got up and ran to an apartment across the street (T 207), whereupon the petitioner, with the gun still in his hand, went to the doorway where the deceased had entered (T 208). Margaret Harrell also testified that at no time did she see the deceased with any weapon, and the only weapon of the deceased that she knew about was a pocketknife, about as long as your finger, which was in his pocket (T 211). The deceased never got out of the truck on the side towards the petitioner's house, or even took the key out of the ignition (T 214).

Alice Suggs, who was also a witness to the shooting, testified that she did not see the deceased with any weapon and that the deceased did not get out of the truck on the driver's side (T 269, 275).

Roberta Ware testified that after the shooting, the

deceased came into her apartment (T 448), and the petitioner came to the door and said, where is that s.o.b.? (T 450).

One Shelly Williams testified that she saw the deceased and his wife lying in the road and the petitioner with a gun in his hand pointing it at them (T 454).

Petitioner, himself, on cross-examination, testified that the deceased never got out the truck and he did not see any weapon in the deceased's hand (T 612), and Officer Walker, who participated in the investigation, said upon arriving at the scene he found the right-hand door of the truck open, but the left-hand door was closed (T 398, 492).

ARGUMENT

As to First Question:

In reply to petitioner's first question, it should be stated, at the outset, that the issue is a very simple one, and no amount of strange semantics can convert it into one warranting review by this Court on certiorari. Petitioner contends that he has been deprived of a substantial right, based upon real evidence, to have the jury fully instructed as to the law of Florida applicable to the charge. In support of this contention, he cites **Calton v. Utah,** 130 U.S. 83, 9 S.Ct.435 and **Bird v. United States,** 180 U.S. 356, 21 S.Ct. 403.

In the **Calton** case, supra, this Court held that the Territorial Court of Utah failed to instruct the jury, as provided for by statute, that even if they found

the defendant guilty of murder in the first degree, they could still recommend mercy, which would fix his penalty at life imprisonment instead of death.

In **Bird,** supra, the trial court merely instructed the jury regarding the defense of self-defense, that unless the jury found from the evidence that the killing was not in the necessary defense of defendant's life, or to prevent the infliction upon him of great bodily harm, he was guilty of murder. This Court held the instruction should have also included the language that if the defendant had reason to believe that the killing was necessary for the defense of his life, or to prevent the infliction upon him of great bodily harm, that he was not guilty.

In the instant case, we do not believe that it is contended by petitioner that the charge given was an incorrect statement of law, but only that it did not include the doctrine of non-necessity of retreat. The Court fully and completely instructed the jury in the instant case on the defense of self-defense based on the facts of the case including the testimony of petitioner, which can easily be seen by a cursory examination of the Court's actual instructions to the jury on self-defense (T 769-771 incl.).

It will be seen in our argument under question 2 that the courts of Florida have not failed to apply the law of Florida, thereby depriving petitioner of a substantial right and his liberty. We submit that the Florida court did, in fact, apply the applicable law under the situation as presented by the facts of the

case, and though petitioner has exhausted his state remedies, he was clearly afforded a fair trial.

As to Second Question:

The Decision of the District Court of Appeal of Florida, Fourth District, herein is not directly contrary to and in direct conflict with the decisions of the Supreme Court of Florida, nor with its own decision in another case. It should be noted, at the outset, that there is no conflict over the fact that the deceased never got out of the truck on the driver's side facing petitioner's home and onto petitioner's premises. The only conflict is whether or not he, in fact, opened the door on the driver's side of the truck. Actually, there is testimony to the effect that after petitioner fired three shots at the deceased, the petitioner then came around to the other side of the truck, where the deceased had alighted from, and fired two more shots while the deceased and his common-law wife were lying in the road. The trial court specifically inquired of counsel for the petitioner, during the trial at the instruction conference, whether or not there was any testimony that the deceased had actually started into the yard of the petitioner, and in view of the fact that deceased never stepped on petitioner's premises, the court declined to give the charge (T 641-643, 782).

Petitioner now contends that the case at bar is in conflict with **Hedges v. State,** (Fla. 1965) 172 So.2d 824; **Pell v. State,** (Fla. 1929) 97 Fla. 650, 122 So. 110; **Danford v. State,** (Fla. 1907) 43 So. 593; and **Watkins v. State,** (Fla. App. 1967) 197 So.2d 312.

In all of the cases above, the deceased was either actually in the home of the defendant, or on his immediate surrounding premises, with the exception of **Danford v. State,** supra. In **Danford v. State,** supra, the defendant was on his own premises, and the deceaseds were on a public road, and the Florida Supreme Court held it was not error to include in the charges to the jury the doctrine or duty of defendant to retreat if necessary or possible.

CONCLUSION

It is respectfully submitted that petitioner's application for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to the Honorable Errol S. Willes, 201 South Second Street, Fort Pierce, Florida 33450, and to the Honorable Raymond E. Ford, P. O. Box 3307, Fort Pierce, Florida 33450, Attorneys for Petitioner, this 20th day of October 1967.

FRED T. GALLAGHER
of Counsel